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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

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| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>ALVIN DAVIS,<br>Defendant and Appellant. | E065552<br>(Super.Ct.No. FSB1502430)<br>OPINION |

APPEAL from the Superior Court of San Bernardino County. Ronald M. Christianson, Judge. Affirmed.

Kenneth H. Nordin, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Senior Assistant Attorney General, and Randall D. Einhorn and Peter Quon, Jr., Deputy Attorneys General, for Plaintiff and Respondent.

During an argument with the woman that he was dating at the time, defendant Alvin Davis punched her in the mouth about five times, loosening her teeth and splitting both her lips.

Defendant was charged with domestic violence (Pen. Code, § 273.5, subd. (a)) with a prior conviction for domestic violence (*id*., subd. (f)(1)). In his first trial, the jury was unable to reach a verdict. In his second trial, the jury found him guilty as charged. He was sentenced to five years in prison, along with the usual fines, fees, and miscellaneous sentencing orders.

Defendant now contends that the trial court erred by:

1. Admitting evidence of defendant's prior domestic violence conviction during the trial of current domestic violence charge, rather than bifurcating the prior conviction allegation.

2. Excluding evidence that Doe had been willing to falsely accuse a previous boyfriend of injuring her.

We find no error. Hence, we will affirm.

## I

## FACTUAL BACKGROUND

### A. *Prior Conviction.*

In 2011, defendant pleaded guilty to domestic violence against a different victim than in this case. (Pen. Code, § 273.5, subd. (a).) He was placed on probation; in 2012, however, his probation was revoked and he was sentenced to two years in prison.

B. *Uncharged Prior Attack on Doe*.

Jane Doe[1] testified that she and defendant started dating in late May or early June, 2015. They considered themselves "boyfriend and girlfriend"; their relationship included sex. They were together every day. However, Doe did not have any photos of herself with defendant.

On June 12, 2015, the police went to defendant's apartment in San Bernardino in response to a battery call. They contacted Doe, who reported that defendant had punched her in the mouth with a closed fist. When they pointed out, however, that she had no visible injuries, she changed her story and said that defendant slapped her with an open palm. She added that defendant also kicked her. At trial, Doe testified that defendant "kicked [her] in the butt" and "smooshed" her in the face.

Doe told police that she had been dating defendant for two months. Defendant said he had been dating Doe for about three weeks.

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[1] A victim is not supposed to be referred to by a fictitious name unless the trial court so orders, based on a finding that a fictitious name "is reasonably necessary to protect the privacy of the person and will not unduly prejudice the prosecution or the defense." (Pen. Code, § 293.5, subd. (a).) We have not found any such order in the record.

However, the trial court did give "Jane Doe" instructions. (CALCRIM Nos. 123, 208.) While it is the better practice to make a formal order, we consider this to be a de facto "Jane Doe" order under Penal Code section 293.5.

C. *Charged Attack on Doe*.

On July 15, 2015, Doe went over to defendant's apartment. Defendant's brother was there. In a bedroom, defendant started "giving [Doe] oral sex." He then asked if she wanted his brother to come in. He was acting "weird"; she felt uncomfortable, so she ran out of the apartment.

Defendant ran after her. He said, "Bitch, if you think I sucked your pussy for an hour and you're leaving, you've got another thin[k] coming . . . ." He grabbed her purse; she let it slide off her shoulder and kept running.

Once outside, however, she demanded her purse back. He demanded that she go back inside. She said she would go inside if he gave her her purse. He gave it to her, but added, "Bitch, if I give you this purse and you don't go back into the house, I'm going to jail today." Defendant then punched her in the mouth with his closed fist.

Defendant went over to Doe's car and "pop[ped]" its hood open, apparently intending to disable it. Doe pushed the hood back down. Defendant then punched her three or four more times. She started running again. Defendant picked up her purse and dumped out the contents.

Doe called 911. She reported that defendant "busted [her] mouth." She did not specifically say that he was her boyfriend.

A responding officer noted blood around Doe's mouth and on her shirt. She showed him a half-inch cut inside her upper lip. Ultimately, Doe received six stitches to her upper lip and four stitches to her lower lip. Her lower teeth were loose.

Doe admitted prior convictions in 2005 for welfare fraud, a felony, and in 2012 for "false documents," a misdemeanor.

When the police interviewed defendant, he denied that he and Doe were dating. He added "that he did not touch her and that she was a lying bitch." He claimed that Doe came to his house and fell while she was leaving. There were no apparent injuries to his hands.

According to the officer who transported defendant to jail, defendant said that he had had a "past relationship" with Doe. However, the officer did not include this statement in his report.

A young neighbor[2] testified that his cousin told him, "[S]omeone's hitting a woman in the front yard." When he ran out in front, he saw defendant grab Doe's purse and dump the contents on the ground. Defendant then punched Doe in the jaw with a closed fist some five to ten times.

II

THE ADMISSION OF EVIDENCE OF DEFENDANT'S PRIOR CONVICITON

Defendant contends that the trial court erred by admitting evidence of his prior domestic violence conviction.

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[2] His age would have been apparent to the jury, but he was not asked to state it for the record. At the preliminary hearing, he was described as 15 or 16 years old.

A. *Additional Factual and Procedural Background*.

As mentioned, defendant was charged with domestic violence with a prior conviction. The alleged prior conviction was a 2011 conviction for domestic violence.

In defendant's first trial, the prosecution moved in limine to admit evidence of the prior conviction under Evidence Code section 1109. The trial court, however, excluded the evidence "due to insufficient notice." At the end of the trial, the jury was unable to reach a verdict. All of the jurors believed that defendant hit Doe; however, they were split six-to-six on whether defendant and Doe had the necessary dating relationship.

In the second trial, the prosecution once again moved in limine to admit evidence of the prior conviction under Evidence Code section 1109. Defense counsel objected to the evidence as more prejudicial than probative under Evidence Code section 352. The trial court ruled that the evidence was admissible. It therefore "unbifurcate[d]" the prior. Thus, the jury learned that defendant had a 2011 conviction for domestic violence. And, of course, in the second trial, the jury unanimously found defendant guilty.

B. *Discussion*.

"Under Evidence Code section 1109, evidence of a prior act of domestic violence is admissible to prove the defendant had a propensity to commit domestic violence when the defendant is charged with an offense involving domestic violence." (*People v. Rucker* (2005) 126 Cal.App.4th 1107, 1114.)

"Admission of evidence of prior acts of domestic violence under [Evidence Code] section 1109 is . . . subject to the limitations of [Evidence Code] section 352. [Citation.]"

(*People v. Escobar* (2000) 82 Cal.App.4th 1085, 1095.) Evidence Code section 352 provides that: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

"'Prejudice' in the context of Evidence Code section 352 is not synonymous with 'damaging': it refers to evidence that poses an intolerable risk to the fairness of the proceedings or reliability of the outcome. [Citation.]" (*People v. Booker* (2011) 51 Cal.4th 141, 188.)

"An exercise of discretion under Evidence Code section 352 will be affirmed unless it was arbitrary, capricious, or patently absurd and the ruling resulted in a miscarriage of justice. [Citation.]" (*People v. Winbush* (2017) 2 Cal.5th 402, 469.)

Evidence that defendant had a propensity to commit acts of domestic violence was substantially probative. "'In the determination of probabilities of guilt, evidence of character is relevant. [Citations.]' [Citation.] Indeed, the rationale for excluding such evidence is not that it lacks probative value, but that it is too relevant." (*People v. Fitch* (1997) 55 Cal.App.4th 172, 179.)

Moreover, the evidence in this case was not particularly prejudicial. "Relevant factors in determining prejudice include whether the prior acts of domestic violence were more inflammatory than the charged conduct, the possibility the jury might confuse the prior acts with the charged acts, how recent were the prior acts, and whether the

defendant had already been convicted and punished for the prior offense(s). [Citations.]" (*People v. Rucker, supra,* 126 Cal.App.4th at p. 1119.)

The evidence of the prior conviction consisted exclusively of a so-called "969b packet" (see Pen. Code, § 969b), including the information, a change of plea form, the relevant minute orders, and the abstract of judgment.[3] The jury was not told any of the details of defendant's underlying conduct, except that the victim was *not* the same person as the victim in this case. Thus, the evidence was about as noninflammatory as it could possibly be.

The evidence also made it clear that defendant had expiated his prior crime by serving a two-year prison term. Hence, the jury was not likely to "be tempted to convict the defendant simply to punish him for the other offense[] . . . ." (*People v. Falsetta* (1999) 21 Cal.4th 903, 917.)

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[3] The prosecutor represented to defense counsel and the trial court that he intended to prove the prior conviction using only the 969b packet, adding, "At this time just to expedite the process the People don't intend to utilize a witness and will merely move it into evidence verbally at the end of its case-in-chief."

When the time came, however, the prosecution called a witness who not only authenticated the 969b packet but also walked the jury through it. For example, he explained what an information is, and he explained the meaning of individual items on the plea form.

Defendant complains that the prosecutor supposedly broke his "promise." However, he does not assert this as an error requiring reversal of the judgment. Moreover, he did not preserve any such error by raising it below.

The prior conviction was not remote; the crime occurred approximately four years before the crime in this case.

Finally, the jury was instructed on the proper and improper uses of this evidence. (CALCRIM No. 852.) "We generally presume the jury follows its instructions. Thus, the risk of undue prejudice from the proper use of this evidence . . . was low." (*People v. Clark* (2016) 63 Cal.4th 522, 589.)

Defendant argues that the evidence was prejudicial because it bolstered the credibility of Doe's testimony that she was in a dating relationship with him. This reasoning is weak. The prior conviction was relevant to show a propensity to use violence against persons with whom defendant had an intimate relationship. Defendant's logic seems to be that it showed a propensity to use violence *only* against such people; therefore, if he used violence against Doe at all, he must have had an intimate relationship with her. The jury, however, could well have come to the opposite conclusion — if defendant would use violence against a person with whom he had an intimate relationship, he would use violence against *anyone*, and hence the evidence simply had no bearing on whether he and Doe had an intimate relationship. Finally, even if we accept defendant's reasoning, that is simply how propensity evidence is supposed to work. Thus, the evidence was probative, not prejudicial.

Defendant also suggests that the different outcome in the first trial — in which the evidence was excluded — demonstrates that the evidence was prejudicial. Of course, when the trial court ruled, it had no way of knowing that the second trial would have a

different outcome. Moreover, the evidence at the second trial was significantly different. It included evidence of the uncharged June 12, 2015 prior incident. In that incident, defendant admitted that he had been dating Doe for about three weeks. Defendant discounts this admission because the officer who testified to it did not audio record defendant's statement. However, there was no evidence that his procedures required him to do so. He did include the statement in his report. Doe also said she and defendant were dating. In any event, the very fact that defendant and Doe were in an altercation on June 12, 2015 was evidence that they already had some kind of relationship — i.e., that a month later, on July 15, 2015, Doe was not just a "lying bitch" who happened to come over to defendant's house.

We therefore conclude that the trial court did not abuse its discretion by admitting the evidence of defendant's 2011 domestic violence conviction.

III

THE EXCLUSION OF EVIDENCE OF A PRIOR INCIDENT INVOLVING DOE

Defendant contends that the trial court erred by excluding evidence that Doe had been willing to tell the police falsely that a previous boyfriend had injured her.

A. *Additional Factual and Procedural Background.*

Defense counsel moved in limine to admit evidence of an altercation in 2013 between Doe and one Randy Jones, with whom Doe was then in a relationship.

As he described it, "Randy Jones . . . called the police and indicated that Miss Doe had come at him with a knife and that he was forced to defend himself by throwing a

table at her. When the police arrived Mr. Jones told the police that he believed that she was in another room cutting herself on her hands . . . and then was going to accuse him of having done it." Defense counsel proposed to call Jones and "an officer from that case to impeach Mr. Jones, if necessary."

He argued: "[T]he fact that on a prior occasion, this witness . . . has accused someone, and in the opinion of the officers that came out to the scene was not telling the truth about what was happening . . . , I think that is relevant to the witness's credibility."

The trial court excluded the evidence as more prejudicial than probative. (Evid. Code, § 352.)

B. *Discussion*.

Preliminarily, the People argue that the evidence was inadmissible in any event under Evidence Code section 1101, subdivision (a). This subdivision, as relevant here, provides that: "[E]vidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion."

Evidence Code section 1101, subdivision (c), however, further provides that: "Nothing in this section affects the admissibility of evidence offered to support or attack the credibility of a witness." Accordingly, specific instances of a witness's past dishonesty are admissible to attack the witness's credibility (*In re Freeman* (2006) 38

Cal.4th 630, 640, fn. 5), subject to Evidence Code section 352. (*People v. Wheeler* (1992) 4 Cal.4th 284, 296.)

"[T]he latitude section 352 allows for exclusion of impeachment evidence in individual cases is broad. The statute empowers courts to prevent criminal trials from degenerating into nitpicking wars of attrition over collateral credibility issues." (*People v. Wheeler, supra,* 4 Cal.4th at p. 296.)

Here, the probative value of the evidence was minimal. It does not appear that Doe ever *actually* falsely accused Jones. Rather, according to defense counsel's offer of proof, Jones "*believed* that she . . . *was going to* accuse him . . . ." (Italics added.) This was speculation on Jones's part. Assuming it was based on the fact that Doe was cutting her own hands, defense counsel did not establish that Jones had personal knowledge of this. Once again, the offer of proof was that "Mr. Jones . . . *believed* that she was *in another room* cutting herself on her hands . . . ." (Italics added.) Thus, Jones's speculation was itself based on more speculation. The officers' "opinion" was based on Jones's opinion, and therefore took speculation up to a third level.

In addition, in this case, there was no serious issue about whether defendant did, in fact, punch Doe. The young neighbor — an unbiased, unimpeached witness — testified that he saw defendant punch Doe in the mouth. Photographs documenting the injuries to her face were in evidence. Thus, the evidence was not particularly relevant to show that, because Doe falsely accused Jones, she may also have falsely accused defendant. Rather, defense counsel could argue only that, because Doe falsely accused Jones, she may have

falsely claimed *a dating relationship* with defendant, so that defendant would be subject to *greater punishment* for an act that he indisputably committed. This inference was convoluted and strained.

At the same time, the evidence was prejudicial, because it would have led to a "mini-trial" on the prior incident. Had the evidence been admitted, the prosecutor would have had to ask Doe to relate her version of the incident; surely defense counsel would have cross-examined her about it. Defense counsel indicated that he might have to call not only Jones, but also a police officer to testify to Jones's previous statements. Probably a police officer would have had to testify in any event about whether the physical evidence supported Jones or Doe. Thus, this evidence would have substantially prolonged the trial; without it, the trial lasted only a day and a half. Evidence Code section 352 is designed to prevent the tail from wagging the dog in precisely this fashion.

We therefore conclude that the trial court did not abuse its discretion by excluding evidence of the incident involving Jones and Doe.

IV

DISPOSITION

The judgment is affirmed.

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RAMIREZ
P. J.

We concur:

CODRINGTON
J.

FIELDS
J.